BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERALD KEETING	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,891
BAKER CONCRETE CONSTRUCTION	)	
Respondent	)	
AND	)	
	)	
CIGNA PROPERTY & CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the June 26, 2003 Award entered by Administrative Law Judge Julie A. N. Sample. Stacy Parkinson of Olathe, Kansas, participated in this claim as Board Member Pro Tem.[1] The Board heard oral argument on December 9, 2003.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Thomas R. Hill of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the June 26, 2003 Award.

ISSUES

Claimant alleges he injured his neck while working for respondent in March 1996. In the June 26, 2003 Award, Judge Sample determined claimant was entitled to receive

[1] After the Award, Judge Sample was appointed to this Board. Consequently, Ms. Sample recused herself from this appeal.

a 60.5 percent permanent partial general disability, which was based upon a 65 percent task loss and a 56 percent wage loss.

Respondent and its insurance carrier contend Judge Sample erred. They argue claimant failed to prove he injured his neck while working for respondent and failed to prove he provided respondent with timely notice of the alleged accidental injury. They also argue the Judge erred in determining claimant's average weekly wage at the time of the accident and erred in determining the nature and extent of claimant's injury and disability. Finally, they argue the Judge erred in concluding that documents, including a June 1999 medical report from Dr. P. Brent Koprivica, from earlier settlements were not part of the evidentiary record. Accordingly, respondent and its insurance carrier request the Board to deny claimant's request for workers compensation benefits.

Conversely, claimant requests the Board to affirm the June 26, 2003 Award. Claimant argues the Judge correctly analyzed the facts and the law. Accordingly, claimant requests the Board to adopt the Judge's findings and conclusions.

The issues before the Board on this appeal are:

1. Did claimant injure his neck on either March 15 and 16 or March 15 and 18, 1996, as the result of an accident that arose out of and in the course of his employment with respondent?

2. If so, did claimant provide respondent with timely notice of the alleged March 1996 accidental injury?

3. If so, what is the nature and extent of claimant's injury and disability? In deciding that issue, the Board must also determine claimant's pre- and post-injury wages and the extent of any task loss that claimant sustained as a result of the alleged accident.

4. Did the Judge err in excluding settlement hearing documents from the record when those documents were never offered into evidence and the Judge was not asked to take official notice of those documents?

5. Did the Judge err in excluding Dr. P. Brent Koprivica's June 3, 1999 medical report when the report was never offered into evidence and the doctor did not testify in the proceeding?

6. In the event claimant is entitled to an award of permanent partial general disability benefits, should that award be reduced, pursuant to K.S.A. 44-501(c) (Furse 1993), by an amount representing his preexisting functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes, for the reasons below, the June 26, 2003 Award should be modified to decrease claimant's permanent partial general disability from 60.5 percent to 28 percent.

Claimant was an ironworker. In 1985, claimant sustained his first neck injury, which resulted in a 1988 discectomy and fusion of the fifth and sixth cervical vertebrae. As a result of that accident, claimant did not work until approximately 1991. Claimant then operated a hunting and fishing guide business for approximately three years. But by 1993, claimant had physically recovered to the extent that he returned to work full-time as an ironworker. During his testimony, claimant confirmed that he received $16,038 for the 1985 neck injury.

In January 1996, claimant injured his neck working for another employer, Costello Construction Company (Costello). Despite that injury, claimant continued to work for Costello until sometime in February 1996. According to claimant, his neck symptoms had resolved by the time that he had left Costello's employment. In his testimony, claimant acknowledged that he received $13,750 for the January 1996 injury.

Claimant belonged to the local ironworkers union. Consequently, in March 1996 the union dispatched claimant and several other ironworkers to work for respondent at a mall project in Olathe, Kansas. Claimant's rate of pay was $19.31 per hour and claimant was expected, and he intended, to work full-time as long as there was work for the ironworkers.

On his first day of work for respondent, March 15, 1996, claimant slipped while carrying bundled rebar on his shoulder. Soon after that incident, claimant began experiencing a bad headache. Claimant continued working for respondent, which entailed lifting and carrying items weighing between 80 and 100 pounds and bending over to tie rebar and wall dowels. According to claimant, he then began experiencing pain in his neck that he attributed to the bending that he was doing on the job. Claimant's symptoms worsened while he continued working. Compared to the symptoms that he experienced following the January 1996 incident, the March 1996 symptoms were worse as he experienced numbness and a loss of feeling in his arms and hands. In addition, claimant's headaches were worse.

Claimant worked for respondent for only two days. The record is not entirely clear, but claimant's second and final day working for respondent was either March 16 or March 18, 1996. But the record is clear and uncontradicted that claimant advised his foreman and fellow ironworker, Dennis Gregg, that he was having problems with his neck from carrying, bending over and tying rebar and that he thought he had injured himself on the

job. After working for respondent for two days, claimant did not work for respondent again.

Claimant sought medical treatment from his family physician, who referred him back to Dr. Craig Yorke, the neurosurgeon who performed claimant's 1988 neck surgery. Dr. Yorke saw claimant on April 18, 1996, and diagnosed spinal cord compression between the fourth and fifth cervical vertebrae (C4-5) and to a lesser extent between the sixth and seventh cervical vertebrae (C6-7). In making that diagnosis, the doctor considered a March 1996 MRI, which showed the compressions were caused to a major extent by bulging discs. In June 1996, the doctor performed discectomies at both the C4-5 and C6-7 levels. On September 3, 1996, the doctor released claimant from medical treatment to return as needed.

Dr. Yorke testified in this claim. For unknown reasons, the doctor was not asked to provide his opinion of claimant's functional impairment rating following the June 1996 surgery. Nor was the doctor asked to provide his opinion of claimant's functional impairment rating following the 1988 surgery. The doctor, however, did testify that he believed claimant's neck condition resulted from wear and tear that was consistent with a multitude of small traumatic events and that claimant's work had contributed. The doctor testified, in part:

> What I can say to you is that the abnormalities that I found when I operated on Mr. Keeting are very consistent with wear and tear. They're very consistent with a multitude of small traumatic events. Now, people who do ironwork have this problem; but attorneys, doctors, engineers also can get into this problem. So whether the specifics of ironwork were critical to his developing this, I can't say. I can say that they contributed. But I can't give a number --[2]

After Dr. Yorke's release, the ironworkers union sent claimant to some smaller jobs. After a time, however, the union refused to send him out due to his injuries. Eventually, in September 2002, claimant began driving a truck and delivering ice for an ice company. In that position, claimant works full-time and earns $8.50 per hour.

Dr. Peter V. Bieri, who saw claimant in May 1998 for claimant's previous attorney, also testified in this claim. Utilizing the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (3d ed. rev.), Dr. Bieri concluded that claimant now had a 19 percent whole body functional impairment as a result of the March 1996 work-related injury. The doctor determined that claimant had a 10 percent whole body functional impairment for the two-level disc surgery, which did not include any preexisting impairment from the 1988 surgery as the first surgery was performed at a different intervertebral level. In addition, the doctor found claimant had a five percent whole body

[2] Yorke Depo. at 24.

functional impairment for range of motion deficits in the cervical spine and a 10 percent right upper extremity impairment for radiculopathy, sensory deficit, pain and loss of strength.

Dr. Bieri also opined that claimant sustained a 65 percent loss of ability to perform former work tasks. On page 7 of the doctor's May 13, 1998 medical report to attorney Mark Works, the doctor wrote, in part:

> Conclusions regarding permanent partial general disability, or so-called work disability, are based on the employment history provided by the claimant. He stated that all of his formal employment for the last 15 years had been that of an iron worker, consistent with a heavy to very heavy physical demand level. Essential job tasks included, but are not limited to, the ability to frequently lift, carry, handle, push, and pull in excess of 50 pounds. Considering the degree of permanent impairment and restrictions issued above, I would conclude the claimant has lost the ability to perform 65% of the essential work tasks prior to injury of March of 1996.[3]

Dr. Bieri's task loss opinion appears limited to claimant's work as an ironworker as the doctor's written report only refers to claimant's work as an ironworker. In addition, the doctor testified he had no specific recollection or notes that he considered the tasks claimant performed for three years as a hunting and fishing guide.

1. Did claimant injure his neck on either March 15 and 16 or March 15 and 18, 1996, as the result of an accident that arose out of and in the course of his employment with respondent?

The Judge determined claimant was credible and that he injured his neck while working for respondent. The Board affirms that finding.

The greater weight of the evidence establishes that claimant sustained additional injury to his neck while carrying, lifting and handling heavy bundles of rebar while working for respondent. Despite the January 1996 incident at Costello Construction Company, claimant's neck symptoms resolved and claimant was relatively symptom-free by February 1996 when he left Costello's employment and also in March 1996 when he began working for respondent. Considering Dr. Yorke's testimony that claimant's neck injury was consistent with a multitude of micro-traumas, the Board finds that claimant sustained such micro-traumas in March 1996 while working for respondent and repetitively lifting heavy bundles of rebar and bending over to tie that rebar. The Board adopts the March 16, 1996 date of accident as determined by the Judge.

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[3] Bieri Depo., Ex. 2.

2. Did claimant provide respondent with timely notice of the accident or the neck injury?

The Judge concluded claimant notified his foreman, Dennis Gregg, before leaving work either on March 15 or 16, 1996, about his injury and its relationship to his work. Accordingly, the Judge concluded claimant provided respondent with timely notice of the accidental injury, as required by K.S.A. 44-520 (Furse 1993). The Board affirms that finding.

Claimant's testimony is uncontradicted that he advised his fellow ironworker and foreman, Dennis Gregg, that bending and tying rebar was hurting his neck and that he thought he had been injured on the job. Claimant's testimony, which is credible and persuasive, is somewhat supported by the testimony of Thomas W. Graham, Jr., who was respondent's project manager at the construction site and testified that the ironworkers had their own foreman on the project, although he could not recall who it may have been at the time in question. Mr. Graham also confirmed that the workers on the mall project were to report any accidents to their respective foreman.

3. What is the nature and extent of claimant's injury and disability, including the extent of any loss between his pre- and post-injury wages and the extent of any task loss following the alleged March 1996 accidental injury?

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment *[sic]*, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is

> engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[4]

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

The Kansas Court of Appeals in *Watson*[8] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the residual capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[9]

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[4] K.S.A. 44-510e (Furse 1993) (emphasis added).

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[9] *Id.* at Syl. ¶ 4.

In determining claimant's average weekly wage, the Judge determined claimant was a full-time worker and, therefore, the Judge multiplied the $19.31 hourly rate that claimant was earning in March 1996 by 40 hours, which is the minimum number of hours that a full-time worker is generally considered to work.[10]

The Board affirms the Judge's finding that claimant should be considered a full-time worker as he was hired to work, and intended to work, on a full-time basis until the ironwork was completed at the construction site. Therefore, claimant's average weekly wage for the date of accident should be based upon a 40-hour workweek, which creates a pre-injury average weekly wage of $772.40.

The Judge determined claimant failed to prove he made a good faith effort to seek appropriate employment following his September 1996 medical release to return to work. Accordingly, for the wage loss prong of the permanent partial general disability formula the Judge used claimant's hourly wage rate with the ice company, or $8.50 per hour, and found claimant's post-injury wage was $340 per week for all pertinent periods following September 3, 1996. Comparing claimant's pre-injury wage of $772.40 with his post-injury wage of $340, the Judge concluded claimant sustained a 56 percent wage loss. The Board agrees.

The record does not address what efforts claimant made to find appropriate work following his September 1996 medical release. Moreover, claimant does not contest the Judge's analysis of his wage loss, including imputing a post-injury wage for the period before he began working for the ice company.

The Judge also concluded that claimant sustained a 65 percent task loss due to the March 1996 neck injury. The Board, however, disagrees. The only evidence regarding task loss was provided by Dr. Bieri. The doctor, however, did not have a list that itemized the work tasks that claimant allegedly performed over the 15-year period before the March 1996 neck injury. Furthermore, it is more probably true than not that the doctor did not consider the work tasks that claimant performed for approximately three years as a fishing and hunting guide following his 1988 neck surgery. Closely examining Dr. Bieri's testimony and the May 13, 1998 report, it appears that Dr. Bieri did not consider actual work tasks but, instead, considered only the general physical requirements of an ironworker.

Claimant has the burden of proof to prove his task loss. And, in this instance, the Board is not persuaded that Dr. Bieri addressed claimant's actual work tasks. Accordingly, because claimant failed to prove his task loss, for purposes of the task loss prong of the permanent partial general disability formula, the task loss is zero percent.

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[10] See K.S.A. 44-511(b)(4) (Furse 1993).

As required by the above-quoted statute, claimant's 56 percent wage loss is averaged with his zero percent task loss, which creates a 28 percent permanent partial general disability.

4. Should claimant's award be reduced, pursuant to K.S.A. 44-501(c) (Furse 1993), by an amount representing his preexisting functional impairment?

Respondent and its insurance carrier argue claimant's settlements for the December 1985 and January 1996 neck injuries should be considered when determining the benefits due claimant in this proceeding.

The Workers Compensation Act in K.S.A. 44-510a (Furse 1993) provides that permanent partial disability compensation may be reduced when an earlier disability contributes to the overall disability from a later accident. But respondent and its insurance carrier do not contend a K.S.A. 44-510a (Furse 1993) reduction is applicable in this proceeding.

The Act also provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**[11]

And functional impairment is defined by K.S.A. 44-510e (Furse 1993), as follows:

> **Functional impairment means** the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines** for the Evaluation of Physical Impairment *[sic]*, if the impairment is contained therein. (Emphasis added.)

Consequently, the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the AMA *Guides*, if the impairment is contained in those *Guides*. Moreover, the Act requires that the amount of the functional impairment be established by competent medical evidence.

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[11] K.S.A. 44-501(c) (Furse 1993) (emphasis added).

On the other hand, the Act does not require that the preexisting functional impairment was evaluated or rated before the later work-related accident. Nor does the Act require that the worker had been given work restrictions for the preexisting condition before the later work-related accident. Nonetheless, the Act does require that the preexisting condition must have actually constituted a rateable functional impairment.

The Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,[12] the Kansas Court of Appeals stated:

> Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both Baxter and Hampton instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton [sic]* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

It is probably true claimant had functional impairment due to his 1988 neck surgery. But respondent and its insurance carrier failed to prove what that functional impairment was. Neither of the two doctors who testified, Dr. Bieri and Dr. Yorke, established claimant's preexisting functional impairment.

Moreover, the Board notes that any preexisting functional impairment would have emanated from a different level of the cervical spine other than the two levels that claimant injured in March 1996. Consequently, the evidence fails to prove that the March 1996 accident aggravated a preexisting condition.

For purposes of K.S.A. 44-501(c) (Furse 1993), respondent and its insurance carrier have failed to prove the amount of functional impairment that existed due to claimant's neck before his March 1996 accident or that claimant's present functional impairment rating includes an amount representing a preexisting condition.

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[12] *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals June 9, 2000) (unpublished opinion).

> The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.[13]

Consequently, the award should not be reduced for preexisting functional impairment under the provisions of K.S.A. 44-501(c) (Furse 1993).

5. Did the Judge err in excluding Dr. P. Brent Koprivica's June 3, 1999 medical report when the report was never offered into evidence and the doctor did not testify in the proceeding?

The Judge did not err in excluding Dr. Koprivica's June 3, 1999 medical report. First, the report was never offered into evidence. Second, Dr. Koprivica did not testify in this proceeding and, therefore, the report is not admissible pursuant to K.S.A. 44-519 (Furse 1993), which provides:

> No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

6. Did the Judge err in excluding settlement hearing documents from the record when those documents were never offered into evidence and the Judge was not asked to take official notice of those documents?

The Judge did not err in excluding the settlement hearing documents from the evidentiary record. The records were never offered into evidence and, therefore, claimant was not provided an opportunity to lodge any objection. Some evidentiary rules are relaxed in workers compensation proceedings. But, in the absence of a stipulation, fundamental fairness requires that documents be presented and offered into evidence before they can be considered part of the evidentiary record. If not, the parties and judges would not know what evidence is to be considered in a claim. Moreover, requiring parties to offer documents for the record preserves the opposing parties' rights to lodge their legal objections.

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[13] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Excluding the Judge's analysis and finding of task loss, the Board adopts the findings and conclusions set forth in the Award.

AWARD

WHEREFORE, the Board modifies the June 26, 2003 Award and decreases claimant's permanent partial general disability from 60.5 percent to 28 percent.

Gerald Keeting is granted compensation from Baker Concrete Construction and its insurance carrier for a March 16, 1996 accident and resulting disability. Based upon an average weekly wage of $772.40, Mr. Keeting is entitled to receive 12 weeks of temporary total disability benefits at $326 per week, or $3,912, plus 116.20 weeks of permanent partial general disability benefits at $326 per week, or $37,881.20, for a 28 percent permanent partial general disability, making a total award of $41,793.20, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Thomas R. Hill, Attorney for Respondent and its Insurance Carrier
Anne Haught, Acting Workers Compensation Director